FIFTH AMENDMENT — *MIRANDA* RIGHTS — NINTH CIRCUIT DENIES REHEARING EN BANC TO CONSIDER WHETHER A *MIRANDA* VIOLATION CAN GIVE RISE TO A CLAIM UNDER § 1983. — *Tekoh v. County of Los Angeles*, 997 F.3d 1260 (9th Cir. 2021), *cert. granted sub nom. Vega v. Tekoh*, 142 S. Ct. 858 (2022) (mem.).

Perhaps no other Supreme Court rule is as "embedded in . . . our national culture"[1] as the eponymous warnings of *Miranda v. Arizona*.[2] Despite *Miranda*'s "pathmarking" prominence,[3] its warnings remain difficult to classify. Some categorize *Miranda* as a "prophylactic rule," meaning that it safeguards constitutional rights but "can be violated without violating the Constitution itself."[4] Others categorize it as a "constitutional rule," required by the Constitution and therefore resistant to congressional supersession.[5] And still others object to this dichotomy outright.[6] The "word games"[7] of understanding how to classify *Miranda* are far from trivial: these taxonomic difficulties have resulted in disputes over whether 42 U.S.C. § 1983 provides a cause of action for violations of *Miranda* rights.[8] Recently, in *Tekoh v. County of Los Angeles*,[9] the Ninth Circuit denied a petition for rehearing en banc,[10] leaving intact the panel's holding that using an un-Mirandized statement at trial gives rise to § 1983 liability.[11] Though the Ninth Circuit correctly denied en banc rehearing, the dissent's demotion of

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[1] Dickerson v. United States, 530 U.S. 428, 443 (2000); *see also* Ronald Steiner, Rebecca Bauer & Rohit Talwar, *The Rise and Fall of the* Miranda *Warnings in Popular Culture*, 59 CLEV. ST. L. REV. 219, 229–35 (2011) (showcasing data on depictions of full-length *Miranda* warnings in popular legal and police television dramas).

[2] 384 U.S. 436 (1966).

[3] Florida v. Powell, 559 U.S. 50, 53 (2010) (Ginsburg, J., writing for the majority).

[4] Joseph D. Grano, Miranda*'s Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174, 176–77 (1988).

[5] *Dickerson*, 530 U.S. at 444.

[6] *See* John T. Parry, *Constitutional Interpretation, Coercive Interrogation, and Civil Rights Litigation After* Chavez v. Martinez, 39 GA. L. REV. 733, 786 (2005) ("The tools we develop to reach results in individual cases, including prophylactic rules, . . . together with the results of individual cases *are* the meaning of the Constitution."); David A. Strauss, Miranda*, the Constitution, and Congress*, 99 MICH. L. REV. 958, 960 (2001) ("[T]o ask whether *Miranda* warnings are required by the Constitution or are mere prophylactic rules that go beyond what the Constitution itself requires . . . is misleading because constitutional rules — routinely, unavoidably, and quite properly — treat the Constitution itself as requiring prophylaxis." (internal quotation marks omitted)).

[7] *Dickerson*, 530 U.S. at 454 (Scalia, J., dissenting) ("The Court today insists that the *decision* in *Miranda* is a 'constitutional' one, that it has 'constitutional underpinnings,' a 'constitutional basis' and a 'constitutional origin,' that it was 'constitutionally based,' and that it announced a 'constitutional rule.'" (citations omitted)).

[8] *See, e.g.*, Chavez v. Martinez, 538 U.S. 760, 772 (2003) (plurality opinion).

[9] 997 F.3d 1260 (9th Cir. 2021), *cert. granted sub nom.* Vega v. Tekoh, 142 S. Ct. 858 (2022) (mem.).

[10] *Id.* at 1261.

[11] Tekoh v. County of Los Angeles, 985 F.3d 713, 715 (9th Cir. 2021).

Miranda warnings from "constitutionalize[d]" to "prophylactic"[12] is unjustified and risks restricting constitutional remedies at the Supreme Court and beyond.

On March 19, 2014, Terence B. Tekoh, a certified nurse assistant, attended to Sylvia Lemus at the Los Angeles County + USC Medical Center.[13] Lemus told other hospital employees that during this time, Tekoh sexually assaulted her.[14] After one employee contacted the police, Deputy Carlos Vega of the Los Angeles Sheriff's Department (LASD) arrived and interviewed Tekoh.[15] Vega did not read Tekoh his *Miranda* rights.[16] During the interview, Tekoh wrote a note admitting to touching Lemus's genitals.[17] According to Vega, Tekoh said that he had "made a mistake" and penned the confession when asked to describe what happened.[18] Tekoh, however, alleged that Vega accused him of the assault and instructed him to write the confession, placing his hand on his gun when Tekoh hesitated.[19] Tekoh further alleged that Vega falsely claimed the assault had been captured on video, ignored his request for counsel, and used racial slurs.[20] Vega arrested Tekoh for unlawful sexual penetration and the case went to trial, where Tekoh was acquitted.[21]

Tekoh subsequently filed a complaint under 42 U.S.C. § 1983 in the Central District of California against Vega, Vega's supervising officer, the LASD, and the County of Los Angeles.[22] Tekoh claimed, among other things, that the defendants had violated his Fifth Amendment right against self-incrimination by failing to give him *Miranda* warnings.[23] Tekoh's proposed instruction would have allowed the jury to find Vega liable per se under § 1983 if it found, by a preponderance of the evidence, that he obtained Tekoh's confession in violation of

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[12] *Tekoh*, 997 F.3d at 1267 (Bumatay, J., dissenting from the denial of rehearing en banc).

[13] Tekoh v. County of Los Angeles, No. CV 16-7297, 2017 WL 5957727, at *1–2 (C.D. Cal. May 25, 2017); Tekoh v. County of Los Angeles, 270 F. Supp. 3d 1163, 1170–71 (C.D. Cal. 2017).

[14] *Tekoh*, 270 F. Supp. 3d at 1171.

[15] *Id.* at 1167, 1171.

[16] *Tekoh*, 2017 WL 5957727, at *3.

[17] *Tekoh*, 270 F. Supp. 3d at 1172.

[18] *Id.*

[19] Tekoh v. County of Los Angeles, 985 F.3d 713, 715–16 (9th Cir. 2021).

[20] *Id.*

[21] *Id.* at 716, 724. The district court first declared a mistrial due to a prosecution witness revealing evidence undisclosed to the defense. *See id.* at 716.

[22] Complaint for Damages for Violations of Civil Rights Under Color of State Law ¶¶ 4–7, *Tekoh*, 270 F. Supp. 3d 1163 (Sept. 28, 2016) (No. CV 16-7297). Tekoh later dropped his claim against the County. *See* First Amended Complaint for Damages for Violations of Civil Rights Under Color of State Law ¶ 6, *Tekoh*, 270 F. Supp. 3d 1163 (June 4, 2017) (No. CV 16-7297) [hereinafter First Amended Complaint].

[23] First Amended Complaint, *supra* note 22, ¶¶ 47–48. Tekoh also claimed that the defendants violated his Fourth Amendment rights by arresting him without probable cause and his Fourteenth Amendment rights by depriving him of substantive and procedural due process. *Id.*

Miranda.[24] After the court denied Tekoh's proposed instruction, the jury returned a verdict in favor of the defendants.[25] Tekoh filed a motion for a new trial, arguing that the court erred by denying his proposed *Miranda* jury instruction.[26]

The district court rejected Tekoh's motion in relevant part.[27] In his decision, Judge Wu concluded that the Supreme Court's holdings "strongly suggest[] that § 1983 liability will not attach to a technical violation of *Miranda*."[28] Judge Wu referred to the *Chavez v. Martinez*[29] plurality, which concluded that violating *Miranda* does not, in itself, "violate [the defendant's] constitutional rights and cannot be grounds for a § 1983 action,"[30] and the *United States v. Patane*[31] plurality, which similarly remarked "a mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights or even the *Miranda* rule."[32] Conversely, according to Judge Wu, Tekoh failed to cite any authority supporting an instruction of per se § 1983 liability for violating *Miranda*.[33] Judge Wu thus concluded that refusing Tekoh's per se jury instruction was not error, but granted the new trial motion on other grounds.[34] After the jury again returned a verdict in favor of the defendants, Tekoh appealed the district court's *Miranda* ruling.[35]

The Ninth Circuit reversed.[36] Writing for the unanimous panel, Judge Wardlaw[37] identified the key question as whether *Miranda* rights are among the "rights, privileges, or immunities secured by the Constitution" under § 1983.[38] Judge Wardlaw explained that the *Chavez*

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[24] Tekoh v. County of Los Angeles, No. CV 16-7297, 2018 WL 9782523, at *4–5 (C.D. Cal. Mar. 8, 2018).

[25] *Id.* at *1.

[26] *Id.* Tekoh also argued that the court failed to include a separate jury instruction for his claim of a coerced confession, erroneously excluded his proffered expert on coerced confessions, and allowed defense counsel's misconduct to deprive him of a fair trial. *Id.* at *1, *7.

[27] *Id.* at *13. The district court also deemed the expert's opinion unnecessary to aid the jury's factual determination and concluded that it appropriately admonished defense counsel's improper statements. *Id.* at *3, *12–13 ("[T]he jury found in Defendants' favor despite defense counsel's misconduct, not because of it." *Id.* at *13.).

[28] *Id.* at *5.

[29] 538 U.S. 760 (2003).

[30] *Tekoh*, 2018 WL 9782523, at *5 (alteration in original) (quoting *Chavez*, 538 U.S. at 772 (plurality opinion)).

[31] 542 U.S. 630 (2004).

[32] *Tekoh*, 2018 WL 9782523, at *6 (quoting *Patane*, 542 U.S. at 641 (plurality opinion)).

[33] *Id.* at *5.

[34] *Id.* at *6, *13. Judge Wu concluded that it was "erroneous *and* prejudicial" for the court not to "include a coerced confession jury instruction under the Fifth Amendment separate and apart from the instruction as to the deliberate fabrication of false evidence" under the Fourteenth Amendment. *Id.* at *11.

[35] Tekoh v. County of Los Angeles, 985 F.3d 713, 718 (9th Cir. 2021).

[36] *Id.* at 721, 726.

[37] Judge Wardlaw was joined by Judges Murguia and Miller.

[38] *Tekoh*, 985 F.3d at 718.

plurality did not "stand for the broader proposition that a § 1983 claim can never be grounded on a *Miranda* violation."[39] She prefaced that "[w]hen no single rationale commands a majority of the Court, only the specific result is binding on lower federal courts."[40] And since, unlike in *Chavez*, Tekoh's un-Mirandized statement was admitted (rather than excluded) in his criminal proceedings, *Chavez* was inapplicable.[41] Judge Wardlaw further asserted that the *Patane* plurality did not apply either, since the narrowest of the fractured opinions — Justice Kennedy's concurrence — did not discuss *Miranda*'s constitutional status.[42] Judge Wardlaw thus concluded that only *Dickerson v. United States*,[43] which "made clear that the right of a criminal defendant against having an un-Mirandized statement introduced in the prosecution's case in chief is indeed a right secured by the Constitution," provided binding precedent.[44]

The Ninth Circuit denied a petition for rehearing en banc.[45] Judge Bumatay dissented.[46] Quite literally charting the Supreme Court's description of *Miranda* warnings as "prophylactic" rather than a "constitutional right,"[47] Judge Bumatay asserted that the panel's decision constituted a "rewriting [of] the Fifth Amendment."[48] From early English common law to the Fifth Amendment's ratification, the historical "lodestar" of the Fifth Amendment's Self-Incrimination Clause, to Judge Bumatay, was "voluntariness, not prophylaxis."[49] Judge Bumatay viewed the *Miranda* decision as "refus[ing] to say that 'the Constitution necessarily requires adherence to any particular' pre-interrogation procedures," and thus "[n]othing in *Miranda* itself . . . can be said to constitutionalize its eponymous warnings."[50] And *Dickerson*'s holding, to Judge Bumatay, was inapposite, since it branded *Miranda* as a "constitutional rule" but not a "constitutional right" as required for

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[39] *Id.* at 721.

[40] *Id.* (quoting United States v. Davis, 825 F.3d 1014, 1022 (9th Cir. 2016)).

[41] *Id.* at 722.

[42] *Id.* at 721–22 (citing United States v. Patane, 542 U.S. 630, 644–45 (2004) (Kennedy, J., concurring in the judgment)).

[43] 530 U.S. 428 (2000).

[44] *Tekoh*, 985 F.3d at 720, 722. Judge Wardlaw also cited to previous cases from the Ninth Circuit and sister circuits that came to similar conclusions. *Id.* at 722–23; *see, e.g.*, Stoot v. City of Everett, 582 F.3d 910, 923 (9th Cir. 2009) (determining *Chavez* does not apply to cases where allegedly coerced statements are used in criminal proceedings); Jackson v. Barnes, 749 F.3d 755, 762, 767 (9th Cir. 2014) (holding un-Mirandized statement used at criminal trial may give rise to § 1983 claim); Sornberger v. City of Knoxville, 434 F.3d 1006, 1026–27 (7th Cir. 2006) (same); Murray v. Earle, 405 F.3d 278, 285 & n.11 (5th Cir. 2005) (same).

[45] *Tekoh*, 997 F.3d at 1261.

[46] *Id.* at 1264 (Bumatay, J., dissenting from the denial of rehearing en banc). Judge Bumatay was joined by Judges Callahan, Ikuta, Bennett, R. Nelson, Bress, and VanDyke.

[47] *Id.* at 1265 chart.

[48] *Id.* at 1265.

[49] *Id.* at 1266.

[50] *Id.* at 1267 (quoting Miranda v. Arizona, 384 U.S. 436, 467 (1966)).

§ 1983 liability.[51] Judge Bumatay further pointed to Justice Souter's *Chavez* concurrence, which "questioned the need for civil liability when certain non-core Fifth Amendment violations occurred."[52] Judge Bumatay therefore concluded that the panel decision was detached from text, history, and precedent and should have been reconsidered.[53]

Judge Miller concurred in the denial.[54] He emphasized that the Ninth Circuit "lack[ed] authority to resolve contradictions in the Supreme Court's precedents."[55] As such, Judge Miller concluded that the en banc dissent's discussion of the text, history, and common law development of the Fifth Amendment was irrelevant.[56] Noting that *Dickerson* prevented Congress from replacing *Miranda* rights, Judge Miller asked: "If *Miranda* is not 'secured by the Constitution,' then why is Congress not allowed to dispense with it?"[57] Finally, Judge Miller noted that since "[t]he circuit split is not nearly as lopsided as the dissenters assert,"[58] a rehearing would not resolve the conflict and thus did not "involve[] a question of exceptional importance" required to grant rehearing en banc.[59] The Supreme Court granted certiorari.[60]

By denying the petition to rehear the case en banc, the Ninth Circuit correctly held that § 1983 applied to the use of an un-Mirandized statement at trial. Yet the dissent's insistence that *Miranda* rights are prophylactic — that a *Miranda* violation does not necessarily result in a constitutional violation — undermines *Miranda*. Neither the Constitution nor Supreme Court precedent compels the dissent's language of prophylaxis. Nevertheless, this interpretation threatens not only § 1983 claims based on *Miranda* violations, but also any other constitutional remedies deemed "prophylactic" if other jurists — especially a majority of the Supreme Court — follow suit.

Though the dissent presumed that prophylactic rules are "less than a 'right'" for § 1983 purposes,[61] neither constitutional text nor Supreme Court precedent requires this interpretation. The Constitution does not distinguish between "prophylactic" and "constitutional" rules.[62] Judges

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[51] *Id.* at 1270.

[52] *Id.* (citing Chavez v. Martinez, 538 U.S. 760, 778–79, 779 n.* (2003) (Souter, J., concurring in the judgment)).

[53] *Id.* at 1272.

[54] *Id.* at 1261 (Miller, J., concurring in the denial of rehearing en banc). Judge Miller was joined by Judges Wardlaw and Murguia.

[55] *Id.*

[56] *Id.*

[57] *Id.* at 1262 (citation omitted) (quoting 42 U.S.C. § 1983).

[58] *Id.* at 1263.

[59] *Id.* (quoting FED. R. APP. P. 35(a)(2)).

[60] Vega v. Tekoh, 142 S. Ct. 858 (2022) (mem.).

[61] *Tekoh*, 997 F.3d at 1264 (Bumatay, J., dissenting from the denial of rehearing en banc).

[62] *See* Yale Kamisar, Willard Pedrick Lecture, Miranda *Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in* Dickerson, 33 ARIZ. ST. L.J. 387, 426 (2001) (noting

and academics initially invented this dichotomy to distinguish "*Marbury*-shielded" interpretation from "congressionally reversible" implementation.[63] Yet *Dickerson* belied this dichotomy by declaring 18 U.S.C. § 3501 unconstitutional in defense of the "prophylactic" *Miranda* rights.[64] Thus, while the dissent criticized the court for "contraven[ing]" and "rewriting" the Fifth Amendment,[65] its severance of prophylactic rules from constitutional rights is itself a judicial creation.

In fact, prophylactic rules are commonly accepted as constitutionally required in several other areas of constitutional law. In the First Amendment context, for example, Professor David Strauss notes that the "unquestioned" presumption that content-based restrictions are unconstitutional is a prophylactic rule, since it "forbids some restrictions on speech that . . . do not offend against the central values of the First Amendment."[66] One example Strauss cites is a city banning pro-life — but not labor — picketing near hospitals based on an objective likelihood of violence rather than subjective disapproval.[67] Applying the *Tekoh* dissent's logic would find this regulation to violate no constitutional right, despite firm consensus stating otherwise, since the core constitutional right of protection from government hostility to speech remains unviolated.[68] Professor Susan Klein likewise demonstrates accepted prophylaxis in Fourth Amendment jurisprudence with the per se warrant requirement, which states a rebuttable presumption that "searches conducted without a judicial warrant are per se unreasonable."[69]

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that the test preceding *Miranda* "was no more a rule of the pure *Marbury* variety, no more 'directly compelled' by the Constitution, and no more a product of the 'explicit' text of the Constitution than *Miranda* itself"); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 903 (1999) ("Any piece of constitutional doctrine can probably be regarded as prophylactic with respect to some abstract principle hypothesized as the ultimate end the doctrine is meant to serve."); Strauss, *supra* note 6, at 963 ("[T]he Constitution does not ordain any particular institutional mechanism for ensuring that compelled statements are not admitted into evidence.").

[63] Henry P. Monaghan, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 31 (1975); *see* Michigan v. Tucker, 417 U.S. 433, 439 (1974); Grano, *supra* note 4, at 175–76.

[64] Dickerson v. United States, 530 U.S. 428, 432, 444 (2000). Congress enacted § 3501 to effectively overrule *Miranda* and reinstate voluntariness as "the touchstone of admissibility." *Id.* at 436; *see id.* at 435–37.

[65] *Tekoh*, 997 F.3d at 1265 (Bumatay, J., dissenting from the denial of rehearing en banc).

[66] Strauss, *supra* note 6, at 964.

[67] *Id.* at 963–64.

[68] *See id.* at 964 (citing Police Dep't of Chi. v. Mosley, 408 U.S. 92 (1972)). In the *Miranda* context, scholars are split as to how the Court's authority on decision rules may extend past "core" constitutional meaning. *Compare* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 132 (2004) (asserting that the *Miranda* rule is "designed to reduce adjudicatory error"), *with* Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 814 (2022) (arguing that Professor Mitchell Berman's approach "assumes the Court wasn't bound by preexisting rules of evidence and procedure").

[69] Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1038 (2001).

Overprotection results when reasonable, but warrantless, searches are found to violate the Fourth Amendment, yet this rule remains a staple in the Supreme Court's search-and-seizure analysis.[70] Under the dissent's logic, however, violating these mainstream constitutional rules would not result in § 1983 liability, despite the Supreme Court holding otherwise.[71] The Court's prophylactic rulemaking for other constitutional provisions thus eases the supposed "tension in the Court's jurisprudence" regarding constitutional prophylaxis.[72]

In reaching its conclusion that *Miranda* is a prophylactic rule but not a constitutional right, the dissent misinterpreted the *Dickerson* majority while overinterpreting the Supreme Court's pluralities and concurrences. The dissent first described how *Dickerson* announced *Miranda* as only a "constitutional rule," not a "constitutional right" as required by § 1983, and then pointed to *Chavez* and *Patane* as confirming the prophylactic understanding of *Miranda*.[73] It erred at both steps. First, the dissent created a distinction without a difference between a rule *creating* a right and the right itself for § 1983 enforcement purposes, thus playing the "word games" that Justice Scalia denounced.[74] Second, it aggrandized *Chavez* and *Patane* by misapplying the rule in *Marks v. United States*,[75] which requires lower courts to follow the Court's pluralities "on the narrowest grounds" of the concurring Justices.[76] In his *Chavez* concurrence, Justice Souter noted that "[t]he question whether the absence of *Miranda* warnings may be a basis for a § 1983 action under any circumstance [was] not before the Court."[77] Likewise, as Judge Wardlaw argued, Justice Kennedy's concurrence in *Patane* omitted any relevant discussion of *Miranda*.[78] None of the "narrowest grounds" from *Chavez* and *Patane* could therefore include limiting *Miranda* on the basis of prophylaxis. The dissent thus erroneously narrowed the Supreme Court's earlier majority opinions by exaggerating its later plurality and concurring opinions.

Though the dissent did not carry the day, its error nevertheless risks limiting constitutional remedies. Dissents from denials of rehearing en banc have become more prevalent in the Supreme Court's docket and

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[70] *See, e.g.*, Carpenter v. United States, 138 S. Ct. 2206, 2221 (2018).

[71] *See Mosley*, 408 U.S. at 93–94, 101–02 (affirming § 1983 liability based on content-based restrictions); Groh v. Ramirez, 540 U.S. 551, 555, 564–65 (2004) (affirming § 1983 liability based on the per se warrant requirement). Some Justices argued that these rules strayed from the literal meaning of the Constitution, but — as in the *Miranda* context — only in nonmajority opinions. *See Mosley*, 408 U.S. at 103 (Burger, C.J., concurring); *Groh*, 540 U.S. at 572 (Thomas, J., dissenting).

[72] *Tekoh*, 997 F.3d at 1262 (Miller, J., concurring in the denial of rehearing en banc).

[73] *Id.* at 1270–71 (Bumatay, J., dissenting from the denial of rehearing en banc).

[74] Dickerson v. United States, 530 U.S. 428, 454 (2000) (Scalia, J., dissenting).

[75] 430 U.S. 188 (1977).

[76] *Id.* at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)).

[77] Chavez v. Martinez, 538 U.S. 760, 779 n.* (2003) (Souter, J., concurring in the judgment).

[78] Tekoh v. County of Los Angeles, 985 F.3d 713, 721–22 (9th Cir. 2021).

have been described as "judicial petitions for certiorari."[79] In his recently granted petition for certiorari, Vega cites "the seven-judge dissent" over ten times.[80] Thus, the stage is amply set for the Supreme Court to consider — and perhaps adopt in majority fashion — the dissent's position. More immediately, a Ninth Circuit panel reckoned with *Miranda*'s prophylactic nature just three months after *Tekoh* in *Chavez v. Robinson*.[81] In her majority opinion, Judge Ikuta, a fellow *Tekoh* dissenter, reasserted that *Miranda* rights are prophylactic and concluded that one "may use the privilege only defensively as a shield, and may not wield it as a sword in an action for damages."[82] The dissent's logic could chill constitutional remedies even outside of the § 1983 context as well. In addition to Strauss and Klein's examples, habeas corpus rights that hinge on *Miranda* violations, as Judge Miller discussed,[83] could also be deemed prophylactic and thus unprotected by the Constitution, given the parallel statutory text between § 1983 and the federal habeas statutes.[84] Though found only in dissent, the prophylactic language of *Tekoh* may limit remedies at the Supreme Court, the Ninth Circuit, and beyond.

As Justice Kennedy stated in his *Chavez* concurrence, "[i]t damages the law, and the vocabulary with which we impart our legal tradition from one generation to the next, to downgrade our understanding of what the Fifth Amendment requires."[85] The *Tekoh* dissent, though nonbinding, leaves constitutional remedies vulnerable to such damage. The dissent's vocabulary of prophylaxis, while supported by a plurality of Justices in *Chavez* and *Patane*, is unmoored from the Constitution and threatens not only § 1983 liability for Fifth Amendment claims, but also any other "prophylactic" remedies affiliated with the Constitution. "Words, words, words" though they may be,[86] the dissent's taxonomy limits the remedies available for constitutional violations, chipping away at the foundation of *Miranda* and *Dickerson*.

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[79] Marsha S. Berzon, *Dissents, "Dissentals," and Decision Making*, 100 CALIF. L. REV. 1479, 1491 (2012); Jeremy D. Horowitz, *Not Taking "No" for an Answer: An Empirical Assessment of Dissents from Denial of Rehearing En Banc*, 102 GEO. L.J. 59, 83 fig.3 (2013) (charting the increasing percentage of cases with such dissents in the Supreme Court's oral argument docket); Andrew Wallender & Madison Alder, *Ninth Circuit Conservatives Use Muscle to Signal Supreme Court*, BLOOMBERG L. (Dec. 8, 2021, 4:45 AM), https://news.bloomberglaw.com/us-law-week/ninth-circuit-conservatives-use-muscle-to-signal-supreme-court [https://perma.cc/7DRS-RC46] (noting the increasing number of dissents from denials of rehearing en banc within the Ninth Circuit).

[80] Petition for a Writ of Certiorari at 10–13, 17, 22–23, 25, Vega v. Tekoh, 142 S. Ct. 858 (2022) (mem.) (No. 21-499).

[81] 12 F.4th 978 (9th Cir. 2021).

[82] *Id.* at 992.

[83] *Tekoh*, 997 F.3d at 1262 (Miller, J., concurring in the denial of rehearing en banc).

[84] For an example of such an argument, see William A. Schroeder, *Federal Habeas Review of State Prisoner Claims Based on Alleged Violations of Prophylactic Rules of Constitutional Criminal Procedure: Reviving and Extending* Stone v. Powell, 60 U. KAN. L. REV. 231, 242–59 (2011).

[85] Chavez v. Martinez, 538 U.S. 760, 794 (2003) (Kennedy, J., concurring in part and dissenting in part).

[86] WILLIAM SHAKESPEARE, HAMLET act II, sc. 2, l. 192 (George Richard Hibbard ed., Oxford Univ. Press 1987) (1603).